In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1728

JAMES SPENCER DUNN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a native and citizen of Canada, contends that he has the status of a permanent resident alien and as such is not subject to deportation.

1. Deportation proceedings were instituted against petitioner and an Order to Show Cause was issued charging that he was deportable under 8 U.S.C. 1251(a)(1) as an immigrant who at the time of his last entry was not in possession of a valid immigrant visa required under 8 U.S.C. 1182(a)(20), and on the additional charge that petitioner was excludable from the United States under 8 U.S.C. 1251(a)(1) in that he was an alien who had departed or remained outside the United States to avoid or evade training or service in the Armed Forces in a time of war or a period declared by the President to be a national emergency under 8 U.S.C. 1182(a)(22).

On September 2, 1971 the special inquiry officer ordered that petitioner be deported from the United States on the charges set forth in the Order to Show Cause (Pet. App. D).[1] On June 19, 1972 the Board of Immigration Appeals dismissed petitioner's appeal from that order (Pet. App. C). The court of appeals affirmed (Pet. App. A).

2. Petitioner entered the United States in 1953 on a permanent resident visa. On August 24, 1966, his local Selective Service Board ordered him to report for induction on September 28, 1966. Petitioner informed the Board that he would not submit to induction because he felt that conscription was immoral and totally unjustified. On September 2, 1966, he departed for Canada. He appeared at the office of the Immigration and Naturalization Service at Vancouver, B.C., Canada on September 6, 1966, and advised that he was adandoning his residence in the United States and then turned in his Form I-151 (Alien Registration Receipt Card) (Pet. App. D 8-9).

Petitioner failed to report for induction as ordered and was indicted in the United States District Court for the Northern District of California for refusing to submit to induction, in violation of 50 U.S.C. App. 462. He was convicted on September 6, 1968 upon his plea of guilty and sentenced to imprisonment for a period of two years, 18 months of which were suspended. He served six months at McNeil Island Penitentiary and thereafter was placed on probation for 18 months. Petitioner was last admitted to the United States as a visitor in January, 1971 (Pet. App. D 9).

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[1] "Pet. App. D" designates the findings of the special inquiry officer.

3. Petitioner contends that he could have been convicted of draft evasion only if he were a permanent resident alien and that the conviction is thus proof that he has the status of a permanent resident alien and, as such, is not subject to deportation. But, petitioner was subject to prosecution for failure to report for induction despite the fact that he had relinquished his resident status in the United States. As the opinion of the Board of Immigration Appeals noted (Pet. App. C 3-4):

> The fact that the respondent may not have been a permanent resident alien did not relieve him from the duty of submitting for induction in the armed forces. The applicable statute, section 12, Universal Military Training and Service Act, 50 U.S.C. App., section 462, reads in pertinent part:
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> > "Any * * * *person* * * * who * * * evades * * * service in the armed forces or any requirements of this title * * * or of said rules, regulations or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations or directions made pursuant to this title * * * shall upon conviction * * * be punished by imprisonment * * *." (Emphasis supplied.)

An induction order imposes a continuing duty on a "registrant" to submit for induction regardless of the fact that he may have abandoned his permanent residence following a departure to evade service in the armed services. Cf. *White* v. *United States*, 403 F. 2d 1005 (8 Cir. 1968), cert. denied 89 S. Ct. 1196 (1969); *United States* v. *Prince*, 398 F. 2d 686 (2 Cir. 1968); *Silverman* v. *United States*, 220 F. 2d 36 (8 Cir. 1955). The Selective

> Service regulations implementing section 12 of the Universal Military Training and Service Act, *supra*, provide in substance that it is a continuing duty of all "registrants" to report for and submit to induction "regardless of the time when or the circumstances under which a registrant fails or failed to report for induction pursuant to an Order to Report for Induction," 32 C.F.R. 1642.2 and 1642.15.

4. Petitioner's assertion that his guilty plea was induced by a promise that he would not be deported is supported only by petitioner's own self-serving statements and was specifically rejected by the Board of Immigration Appeals as follows (Pet. App. C 6):

> The only evidence supporting the respondent's claim that he was assured immunity from deportation in return for a plea of guilty in the criminal action is his self-serving declaration * * * . The special inquiry officer stated for the record that he would reopen the proceeding for corroborating evidence, provided the respondent could produce such evidence within 30 days * * * . To date no such evidence has been submitted. Furthermore, the public defender, who it is alleged gave the assurance, has no authority to enter into any agreement which would bind the Government.

5. Petitioner further alleges that he was not advised that he could have applied to be relieved from liability for training and service under Section 4(a) of the Military Selective Service Act of 1967, 50 U.S.C. App. 454(a). The government was under no duty to inform petitioner of his alternatives to military service. In any event resort to that provision of law does not enhance petitioner's claim that he is not deportable, for Section 4(a) also provides that " * * * any alien who makes such

application shall thereafter be debarred from becoming a citizen of the United States." Thus petitioner would now be subject to deportation based upon his inadmissibility to the United States under 8 U.S.C. 1182(a)(22) as an alien ineligible for citizenship. Petitioner's argument is, therefore, unavailing, since any benefit he might have received under 50 U.S.C. App. 454(a) would have automatically resulted in deportation under the same section of law pursuant to which he has now been ordered deported.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.